11-10-2015

Jordan v. Dean Foods Respondent's Brief Dckt. 43281

IN THE SUPREME COURT OF THE STATE OF IDAHO

EDWARD JORDAN, Claimant/Appellant, v. DEAN FOODS, Employer/Respondent, and ACE INSURANCE and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Sureties/Respondents.	)	**SUPREME COURT NO. 43281**

RESPONDENTS' BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED BY THE IDAHO INDUSTRIAL COMMISSION ON THE 13TH DAY OF APRIL, 2015.

Chairman R. D. Maynard, Presiding

W. Scott Wigle
Bowen & Bailey, LLP
1311 W. Jefferson St.
PO Box 1007
Boise, Idaho 83701

Attorneys for Respondents

Justin Aylsworth
Goicoechea Law Offices, Chtd.
2537 W. State St., Ste. 130
PO Box 1007
Boise, ID 83707

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

I.

STATEMENT OF THE CASE

A. Nature of the Case:

This is an appeal from a decision of the Idaho Industrial Commission, holding that Appellant Edward Jordan ("Claimant") was not entitled to recover additional workers compensation benefits in either of two consolidated cases before the Industrial Commission. In this appeal Claimant challenges the factual findings of the Industrial Commission on disputed medical issues.

Claimant is a former delivery driver for Dean Foods (Meadow Gold). Claimant came to work for Meadow Gold in 2003 after completing a career in the Navy. He came to the employ of Meadow Gold with pre-existing degenerative problems in his cervical spine. On May 16, 2006 Claimant injured his neck in the process of unloading cases of milk. The workers compensation claim arising from that injury was accepted by Meadow Gold and its workers compensation surety at the time, Ace Insurance. The Defendants provided Claimant with medical treatment and physical therapy during the summer of 2006. He was able to continue working during the course of his treatment. He recovered. In early September 2006 Claimant's treating physician determined that he had reached maximum medical improvement or medical stability, that he had no permanent impairment and that he could return to his usual and customary work without restrictions. Claimant returned to his work as a delivery driver for Meadow Gold and thereafter sought no medical treatment for his neck until he again strained his neck on the job on January 12, 2010. Another workers compensation claim was filed and accepted by Meadow Gold and its workers compensation surety, then Indemnity Insurance Company

of North America. Following this 2010 accident Claimant needed a modest amount of treatment for a diagnosed muscular strain. Again, he recovered. Claimant's treating physician released him from care in March 2010, noting that Claimant was asymptomatic, tolerating full and normal activities, including work and that Claimant did not request additional evaluation. Again, no permanent impairment was assessed and no permanent work restrictions were imposed. Thereafter, Claimant successfully returned to his normal work as a delivery driver and sought no further medical treatment for his neck for well over a year.

Claimant later came under the care of an orthopedic surgeon who treated him for non-industrial problems with his knees and lower back. The surgeon also ended up recommending and performing a three-level cervical fusion. Following that surgery Claimant received an impairment rating and permanent work restrictions that precluded him from returning to work for Meadow Gold.

In his workers compensation Complaints Claimant asserted that the need for the cervical spine surgery was causally related to his 2006 and/or 2010 industrial accidents. Meadow Gold and its respective Sureties (collectively "Defendants") denied that the need for surgery arose from either of the industrial accidents. Defendants asserted that the need for surgery resulted instead from Claimant's ongoing degenerative conditions. This dispute was presented to the Industrial Commission for resolution. After considering the evidence the Commission ruled in favor of the Defendants.

B. <u>Course of Proceedings Below</u>:

On December 19, 2011 Claimant filed separate Complaints with the Industrial Commission seeking additional benefits for the 2006 and 2010 industrial accidents. (R.

pp.1,4). The 2006 Complaint alleges entitlement to additional medical benefits and attorney fees. (R. p.1). The 2010 Complaint alleges entitlement to additional medical benefits, temporary disability benefits, permanent physical impairment benefits, permanent partial disability benefits and attorney fees. (R. p.4). After the Defendants answered the Complaints the cases were consolidated for handling. (R. p.13).

On July 18, 2013 an Industrial Commission Referee conducted a hearing in Boise. At the hearing the Referee heard testimony from Claimant and received into evidence exhibits submitted by the parties. Pursuant to arrangements made by the parties during the course of the hearing, additional exhibits were submitted and received into evidence after the hearing. (Tr. p.26,27). All of the exhibits submitted by Claimant were received into evidence. No evidentiary rulings were made during the course of Claimant's testimony that precluded him from testifying fully in support of his claims.

Following the hearing the parties took and submitted post-hearing testimonial depositions of the medical and vocational experts. Claimant submitted the post-hearing deposition testimony of his IME physician Dr. Joseph Verska and his vocational expert Douglas Crum. Defendants took and submitted the post-hearing deposition of Dr. Robert Friedman, who had conducted an independent medical examination of Claimant on behalf of the Defendants. After receiving the post-hearing depositions and written briefs from the parties, the Referee took the matter under advisement.

The Referee authored proposed Findings of Fact and Conclusions of Law, which, if adopted, would have precluded Claimant from recovering any additional workers compensation benefits; *i.e.* the Referee ruled in favor of the Defendants. The Industrial Commission chose not to adopt the Referee's recommendations and on April 13, 2015

issued its own Findings of Fact, Conclusions of Law and Order (R. pp.15-51). The Commission's decision also held in favor of the Defendants, finding that Claimant was not entitled to any additional workers compensation benefits.

On May 15, 2015 Claimant filed his Notice of Appeal (R. p.52-55) challenging the factual findings of the Industrial Commission. (R. p.53).

C. Statement of Facts:

Claimant Edward Jordan, was 48 years of age at the time of the Industrial Commission hearing in July of 2013. Claimant is originally from Mountain Home, Idaho. He left high school early to join the Navy. He obtained a GED while in the service. (Claimant's Ex. N, Claimant's Depo pp.6,7).

Claimant spent more than 20 years in the Navy. The first 10 years or so were spent as a "Gunner's Mate." He served on various ships and traveled throughout the world. (Tr. p.50; Ex. N, Claimant's Depo pp.9,10). During the last half of Claimant's military career he held a desk job as a Career Counselor, assisting Navy personnel in getting the most out of their careers. (Tr. pp.50,78-79).

Claimant retired from the Navy in 2003 at the rank of Chief Petty Officer. (Tr. p 50). He left the service with a 40% disability rating. He has a 10% disability rating for hearing loss, a 10% rating for problems with his left knee that had required surgery and a 20% rating for his lower back with radiculopathy down the right leg. (Tr. p.51).

Soon after leaving the Navy, Claimant and his wife moved to Boise. After a time, he landed a driving job with Meadow Gold. He started with the company in August 2003. For the most part he worked as a delivery driver. (Tr. p.54). During his time at Meadow Gold he held several positions but most involved the delivery of milk and dairy products to Meadow

Gold customers. (Tr. pp. 54,55). Claimant was paid well for his work at Meadow Gold. He recalls that by the end of his time there he was earning approximately $17.50 per hour. Meadow Gold's drivers are unionized and Claimant had a benefit package through the union. (Tr. p.85).

There is no dispute about the fact that that Claimant came to the employ of Meadow Gold with some significant degenerative problems in his cervical spine. The nature of Claimant's prior problems became clear after his 2006 accident at Meadow Gold. Diagnostic studies done at that time showed degenerative changes that had developed over a number of years. (Depo of Dr. Friedman pp.11-13). During his career in the Navy he was treated for neck strains on a couple of occasions. (Tr. pp.52,53). He testified that these problems resolved without any lasting complications. (Tr. p.53).

On May 16, 2006 Claimant suffered an accident and injury while working for Meadow Gold. He was making a delivery. In the course of this he was moving product in the back of his truck. He recalls bending awkwardly while trying to move a stack of milk when he felt pain in his neck and numbness down his arms. (Tr. pp.55,56). After reporting the incident to his supervisor, Claimant was seen at the Emergency Room at St. Luke's – Meridian. Claimant described to the ER physician, Mark Burningham, MD, that he had pain in the back of his neck and pain in his lower back. The pain in Claimant's neck did not radiate. However, he did describe noticing some intermittent numbness in his hands. No neurologic problems were noted. Dr. Burningham diagnosed cervical and lumbar strains. He was uncertain as to what was causing the numbness in Claimant's hands but thought it might be consistent with hyperventilation. Claimant was told that the doctor had found no evidence of any acute neurologic injury and therefore he did not recommend any further

diagnostic studies. Claimant was referred to St. Luke's Occupational Health for follow-up. (Ex. I).

Claimant saw the providers at St. Luke's Occupational Health. He presented there on the day after the accident, May 17, 2006, and was evaluated by a Nurse Practitioner. Claimant was complaining of both neck and low back pain. He was diagnosed with cervical and lumbar strains. He was started on some pain medications and a muscle relaxant and put on restricted duty. (Ex. G, pp.111-113). The low back strain soon resolved.

The employer was able to provide light duty work within Claimant's restrictions and there was no time-loss from the accident of May 16, 2006. (Tr. pp.88,89).

Claimant returned to St. Luke's Occupational Health on May 22, 2006. He reported no improvement of his neck symptoms with anti-inflammatories, muscle relaxants and the work restrictions. He complained of continuing problems with his right hand and right upper extremity. X-rays were ordered and done on May 22, 2006. They were read as showing mild degenerative disc disease at C5-6 and C6-7 with some mild bilateral foraminal narrowing at those levels; *i.e.* the openings in the vertebrae through which the nerves exited the spine were narrowed. There was no evidence of any fracture or mal-alignment. Claimant was kept on a light duty work status and was to follow-up with Dr. Ralph Sutherlin.

Claimant saw Dr. Sutherlin on May 25, 2006, nine days after the industrial accident. Dr. Sutherlin ordered an MRI that was done the same day. (Ex. G, pp.119,120). The MRI showed degenerative disc disease at multiple levels of Claimant's cervical spine. There was a moderate-sized central disc herniation at C4-5 and smaller posterior bulges or protrusions at other levels as well. (Ex. G, pp.122,123). The disc herniation at C4-5 may have been the

result of an acute event or trauma. However, the problems at other levels can be explained by wear and tear over the course of years. (Depo of Dr. Verska, pp.28,29; Depo of Dr. Friedman, pp.13,14).

In any event, there was no indication in the MRI study that any of the disc protrusions were causing any neurological compromise at any level. The C4-5 disc was herniated upwards toward the hand or "cephalad." (Ex. G p.122). When Claimant followed up with Dr. Sutherlin after the MRI, on June 2, 2006, it was noted that his neck strain was improving. Claimant was to continue on light duty work. (Ex. G, p.124). On June 9, 2006 Dr. Sutherlin recommended an EMG study to evaluate Claimant's continuing right upper extremity complaints. Dr. Michael Weiss did the EMG on June 14, 2006. It was read as normal. (Ex. G, p.129).

When Claimant returned to Dr. Sutherlin on June 19, 2006 he reported that he was doing much better. His pain level was down to a "1" on a scale of 0 to 10. He was allowed to increase activities and then go back to full duty work in one week. He was to continue with therapy for stretching and strengthening. (Ex. G, p.131).

On July 12, 2006 Claimant returned to the occupational health clinic. He reported that he was doing much better and was not having any back or neck pain. He was still being bothered by occasional numbness and "pins and needles" feelings in his hands. He told the doctor that this would go away if he moved his hands around in certain ways. Dr. Sutherlin noted that Claimant's neck strain and back strain had fully resolved. The concern was for the continuing complaints of hand numbness. (Ex. G, p.133). This was later determined, through nerve testing to be carpal tunnel syndrome, unrelated to Claimant's neck strain. (Ex. G p.138)

On September 1, 2006 Claimant returned to Dr. Sutherlin. It was noted at that time that Claimant's muscle strain in his neck had fully resolved and he was at maximum medical improvement. Dr. Sutherlin assessed no permanent physical impairment from the 2006 industrial accident. No follow-up appointments were scheduled. (Ex. G p.138).

Accordingly, Claimant treated following the industrial accident of May 16, 2006 and through the summer of 2006. He was diagnosed with a cervical strain that resolved with medications and a course of physical therapy. Claimant was on light duty work for a few weeks following the accident but was soon able to return to full duty. No permanent impairment was assessed as a result of the injury.

After Claimant concluded his treatment for the 2006 accident, he did not seek medical treatment again for his neck until he strained his neck at work again on January 12, 2010. (Tr. p.89). In other words, Claimant worked full-duty for Meadow Gold without the need of any treatment for his neck from early September 2006 until January 12, 2010, a period of more than three years and three months.

On January 12, 2010 Claimant strained his neck again. He was working in the employer's yard. While using a dolly to hook up trailers he felt the pain in his neck and shoulder. (Tr. p.61). Claimant has described feeling symptoms in the same area of his neck as he had following the 2006 accident. In his testimony, he described the symptoms from the 2010 accident as "a lot more extreme." (Tr. p.63). This testimony is not consistent with the medical records. The medical records document that Claimant had a total of four visits to St. Luke's Occupational Health Clinic for the 2010 accident. He also had a short course of physical therapy. Claimant's initial treatment commenced on January 13, 2010. He was

diagnosed with a cervical strain and right shoulder strain, put on light duty and sent to physical therapy. (Ex. G, p.148). When Claimant returned to the clinic a couple of weeks later, on January 25, 2010 it was reported: "Patient states his neck is no longer giving him problems." He was released back to full duty work. (Ex. G, p.151). He still had some shoulder and mid back symptoms and was scheduled for another follow up. He returned a little more than a week later on February 4, 2010. At that time it was recorded that "Patient states that his neck and shoulder are good." (Ex. G, p.154). He had completed his physical therapy and was working full duty. He was still having a problem with a "knot" in one of the muscles in his mid-back near his shoulder blade. This prompted the administration of a trigger point injection when Claimant returned to the clinic for his final visit on February 16, 2010. (Ex. G, p.158). A few weeks later on March 22, 2010 a physician's assistant from the clinic telephoned Claimant to see how he was doing. After speaking to him, the PA reported that he was doing his normal activity, including normal work, that he was asymptomatic and that he did not require further treatment. (Ex. G, p.160, emphasis added).

In summary, the 2010 accident resulted in a few visits to the doctor, a short course of physical therapy and an injection to resolve a knotted muscle. The contemporaneous medical records indicate that Claimant recovered fully from the 2010 accident and injury. There was no time-loss from work during the course of treatment and the treating physicians assessed no permanent impairment or work restrictions. In all, the 2010 accident and injury generated total medical expenses of less than $2,000. (Ex. X).

After Claimant completed his treatment in early 2010 he continued working full duty, full-time for Meadow Gold. He worked for approximately a year and a half without need of any medical treatment relating to his neck. (Tr. p.91)

Then, in the summer of 2011 he went to see his primary care physician Dr. Michael Foutz of Kuna. He saw Dr. Foutz on July 26, 2011. Evidently, Claimant was in the process of having his disability reviewed by the VA. As noted, he had come out of the service with a 40% disability rating for problems with his knees, low back and hearing. (Tr. p.51). Dr. Foutz lists the "Reason for Appointment" as "back pain for years, worse lately, needs documentation for VA." It is clear from the record that Claimant's primary complaint at that time was low back pain, which had begun in the military but was getting worse. Claimant also complained of knee pain, primarily on the left side, where he had had a previous meniscus surgery in the military. There is brief mention in Dr. Foutz chart note of Claimant's neck. Dr. Foutz records "neck pain which is statis (static) in nature – no better or worse." Dr. Foutz ordered MRI scans of Claimant's lumbar spine and of his left knee. He ordered plain x-rays of Claimant's neck, perhaps in relation to a complaint of migraine headache. (Ex. D, pp.25-27).

The diagnostic studies were most significant for a medial meniscus tear in Claimant's left knee. The low back MRI revealed that Claimant had some bulging discs and facet arthropathy, but no indication of compression of the spinal canal or nerve roots. (Ex. D, pp.28-29). Dr. Foutz decided that Claimant needed to see an orthopedist for his knee. A referral was made to Orthopedic Associates of Boise. (Ex. D, p.30).

Claimant got in to see Dr. Timothy Doerr of Orthopedic Associates on August 18, 2011. Although he had been referred there for his knee, when he saw Dr. Doerr his primary complaint was his neck symptoms, reported as ongoing for "several years." Claimant mentioned the industrial accident in 2006. Claimant told Dr. Doerr that he had had neck symptoms prior to the 2006 accident but after the accident in 2006 he started to get

symptoms into his arms. (Ex. E, p.47). Claimant also complained of right knee symptoms in addition to his left knee symptoms. Dr. Doerr ordered MRI scans of Claimant's cervical spine, thoracic spine and right knee. *(Id).* The left knee and lower back had already been scanned.

As it turned out, Claimant had a meniscus tear in his right knee as well as his left. (Ex. D, p.36). With regard to the spinal studies, the scans showed that Claimant had degenerative changes throughout his cervical spine and in some areas of his thoracic spine. (Ex. D pp.37-39) In the cervical spine these changes were resulting in foraminal stenosis in varying degrees from C3-4 through C6-7. Interestingly, the disc herniation at C4-5 that had shown up in scans done after the 2006 accident had resolved. (Ex. D, pp.37,38 and see Depo of Dr. Friedman at pp.14,15).

Dr. Doerr performed arthroscopic surgery on Claimant's left knee on September 1, 2011. (Ex. E, pp.56-58). He did an arthroscopic procedure on the right knee on October 3, 2011. (Ex. E, pp. 68-70). There was no contention that Claimant's knee problems and the need for these surgeries were related to the accidents at issue in this case.

With regard to Claimant's contention that his neck problems are related to the industrial accidents, Dr. Doerr has offered conflicting opinions. After reviewing Claimant's cervical MRI scans Dr. Doerr concluded that Claimant would benefit from a C4-C6 cervical decompression and fusion. In a chart note dated September 15, 2011 Dr. Doerr summarized his understanding of Claimant's situation based on the history he had received from his patient and based upon our review of Claimant's medical records. He concluded that the need for the cervical fusion was brought about by the 2006 industrial accident. Specifically, he stated:

> "Although there has been some progressive degeneration since the MRI on 05/25/06, the patient's symptoms appear to be clearly related to this industrial injury, therefore I believe it is medically more probable than not that his need for C4 to C6 anterior cervical decompression and fusion is directly related to his industrial injury of 05/16/06." (Ex. E, p.61).

Dr. Doerr followed up his chart note with a letter dated September 27, 2011 directed to the adjusting company handling the 2006 workers compensation claim. Again, in this correspondence Dr. Doerr reviews Claimant's medical records and the history he was provided by Claimant and concludes that the 2006 accident brought about the need for the proposed surgery. The letter makes no mention of the 2010 accident. (Ex. E, p.64).

At about the same time that Dr. Doerr was implicating the 2006 accident and injury as the cause of the problem, Claimant was trying to get his primary care physician Dr. Foutz to opine that his neck problems were caused by his years in the Navy. Recall that he was having his disability reevaluated by the VA. Dr. Foutz obliged, and wrote a letter implicating Claimant's years in the service as the cause of his degenerative cervical spine conditions. Dr. Foutz's letter, dated March 16, 2012 indicates that the arthritic condition in Claimant's neck was likely caused by overuse, through "years of wear and tear"... "much of which he incurred in military service." (Ex. D, p.44).

Accordingly, while Dr. Doerr was attempting to get the workers compensation surety for the 2006 claim to authorize his proposed surgery, Claimant was attempting to convince the VA that his neck problems were service-related.

In response to Dr. Doerr's request for authorization of surgery, the adjuster handling the 2006 claim had Claimant scheduled for an independent medical examination by Dr. Robert Friedman of Boise. However, before the IME took place on December 22, 2011, there were a couple of significant developments affecting Claimant's claims. First, Dr.

Doerr changed his opinion with regard to causation. On November 17, 2011 he wrote a letter to the adjusting company for the 2006 claim, in which he suggests, for the first time, that Claimant's accident of January 12, 2010 may have played a role in bringing about the need for surgery. (Ex. E, p.77). Also, on or about December 16, 2011 Claimant's attorney filed Complaints with the Industrial Commission on both the 2006 and 2010 claims. The 2006 Complaint alleges only entitlement to additional medical benefits, no entitlement to income benefits was alleged. (R. p.1).[1] The 2010 Complaint alleged entitlement to medical benefits, as well as temporary disability, permanent impairment and permanent partial disability benefits. (R. p.4). The Defendants' Answers to both Complaints denied that Claimant is entitled to any additional benefits under either claim. (R. pp.9-12).

Dr. Friedman examined Claimant on December 22, 2011. In connection with the IME he reviewed Claimant's medical records and diagnostic studies. He took a history from Claimant and he examined him. Dr. Friedman was asked to comment on issues relating to Claimant's cervical spine complaints and specifically the cause of the need for the surgery being recommended by Dr. Doerr. Dr. Friedman concluded that Claimant's diagnostic studies done in the spring of 2006 showed "clear evidence for ongoing degenerative disease at multiple levels." (Def. Ex. 1, p.757). He believed that the 2006 accident had resulted in a herniated disc at C4-5 with migration of disc material. However, by the time of the scans done in 2011 that disc herniation had resolved. (*Id*). In the comparison of the diagnostic studies Dr. Friedman saw clear evidence that Claimant had ongoing progressive disease at multiple levels of his cervical spine. This was the "normal natural history of his underlying

[1] It is important to note that at the time the Complaints were filed any claims for income benefits stemming from the 2006 accident were time-barred by the five-year statute of limitations, IC section 72–706(2). The practical effect of this was that if Claimant hoped to recover benefits for impairment and disability he needed to implicate the 2010 accident as the cause of his neck problems.

cervical degenerative condition" and not the result of either the 2006 or 2010 accidents. Dr. Friedman opined that Dr. Doerr's proposed surgery would be a medically appropriate option, but the need for that surgery was not brought about by either of the industrial accidents. (*Id*). Dr. Friedman subsequently confirmed this opinion in a letter dated January 19, 2012 (Def. Ex. 1, pp.761,762) and in his post-hearing deposition testimony. (Depo., Dr. Friedman, pp.16,17).

Claimant went on to have his cervical fusion by Dr. Doerr on June 6, 2012. (see Ex. E, pp.81-85). Claimant was able to work for Meadow Gold right up until the day of his surgery. (Claimant's Depo, Ex. N, p.65). After Defendants denied responsibility to the proposed surgery, the costs of surgery were paid through Claimant's union's group health program, offered through his employment and through his military Tri-Care coverage. (Tr. p.74). Claimant had excellent coverage and his out-of-pocket expenses, if any, were minimal – certainly less than the $600 out of pocket limit in his policy. (Tr. p.105). While he was laid up following his surgery he received some modest disability benefits through his union. (Tr. p.74).

Claimant seems to have done fairly well following surgery. He testified that the surgery helped resolve some of his neck pain and upper extremity problems. (Claimant's Depo, Ex. N, pp.68,69). Unfortunately, when Claimant reached maximum medical improvement following the surgery Dr. Doerr gave him permanent work restrictions that were not consistent with continued employment as a driver for Meadow Gold. His employment was terminated. (Tr. p.72).

At the time of the hearing Claimant testified that he was not working. Although no physician has precluded Claimant from returning to work, he was not actively looking for

work. (Tr. 102). Mr. and Mrs. Jordan have an RV and arrangements with a couple of RV parks. The park memberships were purchased at the time of Claimant's retirement from the military. (Tr. p.73). As of the date of the hearing they were living in an RV park in Longview, Washington after spending the winter months in the Palm Springs area. (Tr. p.101).

On November 1, 2012 Dr. Doerr rated Claimant for permanent impairment, using the Sixth Edition of the AMA Guides to Permanent Impairment. He rated Claimant as having an 8% whole person impairment. (Ex. E, p.102) This is the only impairment rating in the record relating to Claimant's cervical spine problems.

Although Claimant filed a Complaint alleging that the 2006 industrial accident brought about the need for surgery, during the Industrial Commission proceedings the 2006 accident claim was essentially abandoned. The testimony and argument from Claimant focused on establishing that the 2010 accident brought about the need for surgery. The Defendants denied that either of the two accidents were responsible for the need for surgery, which arose as a result of the normal progression of Claimant's degenerative arthritic cervical spine conditions. The Industrial Commission found that Claimant had failed to meet his burden of proof and ruled in favor of the defense. On appeal, Claimant challenges the Commission's factual findings supporting that decision.

II.

ARGUMENT

A. The Standard of Review:

On an appeal from the Industrial Commission, this Court's review is limited by the Idaho Constitution to a review of questions of law. Idaho Const. Art. V, § 9. That

provision limits the Court's jurisdiction. *Fife v. The Home Depot, Inc.*, 151 Idaho 509, 513, 260 P.3d 1180, 1184 (2011); *McAlpin v. Wood River Med. Ctr.*, 129 Idaho 1, 3, 921 P.2d 178, 180 (1996); *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 105 Idaho 133, 136, 666 P.2d 1144, 1147 (1983).

Accordingly, although the Court exercises free review over questions of law, its review of factual findings of the Commission is limited to a determination of whether the Commission's factual findings are supported by substantial and competent evidence, which is a question of law. *Warren v. Williams & Parsons P.C. CPA's*, ___ Idaho ___, 337 P.3d 1257, 1263 (2014) citing *Knowlton v. Wood River Med. Ctr.* 151 Idaho 135, 140, 254 P.2d 36, 41 (2011). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *McNulty v. Sinclair Oil Corp.* 152 Idaho 582, 584-5, 272 P.3d 554, 556-57 (2012). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). On appeal, the Court does not re-weigh the evidence, and "[t]he Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous." *Knowlton*, 151 Idaho at 140, 254 P.3d at 41. All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Zapata*, 132 Idaho at 515, 975 P.2d at 1180. In this case it is the Defendants, as the prevailing parties below, who are entitled to have the facts and inferences viewed in the light most favorable to them.

As discussed below, this case turned on the Commission's factual determination that Claimant had failed to meet his burden of proving entitlement to the additional benefits he sought. There is no doubt that Claimant bore that burden. "A workers

compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery." *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

The principal issue before the Commission was the issue of medical causation; i.e. whether the condition of Claimant's cervical spine, and the need for surgery, was causally related to his 2006 industrial accident and/or his 2010 industrial accident. Claimant bore the burden of proving, by a preponderance of the evidence that there was such a medical nexus. The fact that an employee may have suffered a compensable injury to a particular body part does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Hendersen v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). A claimant, who has previously received benefits and is seeking benefits for additional medical care allegedly caused by an industrial accident, still has the burden of proving that the need for the additional medical care was caused by the accident. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 273 P.3d 569, 573 (2012); *Walters v. All Phase Const.*, 156 Idaho 259, 332 P.3d 992 (2014).

To resolve the medical causation issue the Commission was called upon to review and weigh conflicting lay and expert evidence, including a variety of medical expert testimony and written evidence. This is the very purpose of the Industrial Commission. It acts as a factfinder and is free to determine the weight to be given to the testimony of a medical expert. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002). "It is the role of the Industrial Commission, not this Court, to determine the weight and credibility of testimony and to resolve conflicting interpretations of

testimony." *Henderson*, 142 Idaho at 565, 130 P.3d at 1103. "On appeal, this Court will not conduct a de novo review of the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Lopez v. State*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001), quoted in *Walters*, supra, 156 Idaho at 262, 322 P.3d at 995.

This appeal does not raise any legal issues for the Court and no evidentiary rulings are challenged. The Court is simply being asked to second-guess the Commission's factual determinations. The essence of Claimant's argument is that the Commission should have been persuaded by the evidence submitted by Claimant and should have found in Claimant's favor. Claimant's invitation for the Court to reweigh all of the evidence considered by the Commission must be declined.

B. Substantial Competent Evidence Supports the Commission's Findings:

The issue on which this case turned was whether Claimant could meet his burden of proving that the need for the cervical fusion surgery was brought about by his 2006 industrial accident and/or his 2010 industrial accident. This was purely a question of medical causation and a question of fact for the Industrial Commission. The Commission had before it and considered Claimant's testimony both in his deposition and at the Industrial Commission hearing. The Commission had before it and considered all of the documentary evidence, medical and otherwise that had been submitted by Claimant. Claimant had an opportunity after the hearing to take the post-hearing testimonial depositions of his expert witnesses and he did so. These post-hearing depositions were also submitted to and considered by the Commission. The Commission made no evidentiary rulings that precluded Claimant from submitting any of the evidence he sought to have admitted. No arguments were foreclosed by legal rulings.

After considering all of the evidence the Commission found "... that Claimant has failed to meet his burden of proof with respect to both the 2006 and 2010 accidents; Claimant has failed to demonstrate that the need for surgery is more probably than not related to one or both of the subject accidents." (R. p.50, emphasis added).

On appeal, this Court's role is to determine whether there is substantial competent evidence to support that factual finding, when the evidence is viewed in the light most favorable to the prevailing Defendants. *Zapata*, supra.

In ruling on the case below, the Industrial Commission had to sort through and weigh conflicting factual and medical evidence in an effort to determine what evidence was most convincing on the issue of medical causation. That is not always an easy task but it is a task that the Commission handles on a daily basis. Issues of medical causation as regards back or neck injuries can be complex but the Commission develops a particular level of expertise in dealing with these cases, because they do see these cases rather frequently. Regardless of whether or not this case had factual complexities below, on appeal it is not a difficult case. There is more than ample evidence to support the Commission's finding on the issue of medical causation.

The Appellant's Brief contains page after page of references to specific items of evidence, often out of context, that are said to illustrate how the Commission erred in failing to rule in favor of Claimant. It is suggested that the Commission somehow treated Claimant unfairly, in its review of the evidence. The essence of this is that Claimant thinks the Commission should have accepted his medical evidence on the causation

issues and should have found Claimant's testimony to be more credible. Unless the Court is going to reweigh the evidence on these issues, none of this is particularly pertinent.[2]

To find substantial competent evidence supporting the Commission's finding on medical causation, the Court need look no further than the reports and testimony of Dr. Robert Friedman. Dr. Friedman is a physician licensed to practice in Idaho and other states. He received his medical training and degree from the University of Michigan Medical School in Ann Arbor, Michigan. He is a board certified specialist in the field of Physical Medicine and Rehabilitation. The specialty is primarily focused on musculoskeletal pain, chronic orthopedic issues, neuromuscular and neuroskeletal issues and muscular diseases. (Depo., Dr Friedman p.7, and Depo. Ex. 1). He had an opportunity to review Claimant's medical records, to take a history from Claimant and to conduct a physical examination of Claimant, at the request of the Defendants. (Depo., Dr. Friedman p.9). Dr. Friedman was asked to comment on whether Claimant was in need of the cervical spine surgery then being proposed by Dr. Doerr and if so whether the need for surgery bore any relationship to Claimant's industrial accidents at Meadow Gold. After completing his evaluation Dr. Friedman determined that the proposed surgery was medically appropriate, although not medically "necessary" ; *i.e.* Claimant's life was not endangered by not having surgery. (Depo., Dr. Friedman p.10). More importantly to this

[2] It is also, at times, misleading. For example, at page 17 of Appellant's Opening Brief we find the following: "... it is inarguable that at the time of the February 16, 2010 discharge Jordan was in fact experiencing ongoing neck and cervical symptoms." The Brief cites a medical record dated February 16, 2010 in which the doctor advises that the "pain should resolve gradually over time." The reference to this record is obviously meant to imply that Claimant continued to be symptomatic after his treatment concluded, which would be consistent with Claimant's hearing testimony. However, what is unmentioned in the Brief is that when the physician's office followed up with Claimant by telephone the next month, Claimant advised that he had no continuing symptoms and did not need further treatment. (Ex. G, p.160). This is clearly contrary to Claimant's hearing testimony. So, while it may be "inarguable" that Claimant was having some pain on February 16, 2010, the omission of any discussion of the subsequent record makes Claimant's argument entirely misleading.

appeal Dr. Friedman concluded that Claimant's cervical spine condition was appropriate for surgery because of the progression of degenerative conditions affecting Claimant's cervical spine and not due to either the 2006 or 2010 industrial accidents. (See Def's. Ex. 1 and Depo., Dr. Friedman, pp.16,17).

Dr. Friedman provided a convincing explanation of his opinion on medical causation. He noted that Claimant had an MRI scan of his cervical spine nine days after his 2006 industrial accident. That cervical spine MRI showed that Claimant had chronic degenerative conditions in his cervical spine that would have, by their very nature, pre-existed the 2006 accident. He explained:

> ... In fact, the MRI Report confirms multilevel degenerative disks, arthritic degeneration, and narrowing of canals – neuroforaminal canals – as a result of a degenerative processes. By definition, degenerative processes take many weeks or months to occur. (Depo., Dr Friedman p. 13 ll. 2-6).

Dr. Friedman explained that these conditions could not have been the result of an acute injury occurring nine days earlier. They were long-standing conditions. (*id* at p. 13). There is really no dispute about that. Claimant's retained IME physician, Dr. Verska acknowledged that these were degenerative conditions, not the result of an acute event. (Depo., Dr Verska p.29).

Dr. Friedman noted that there was at least one condition shown in the 2006 MRI scans that could have been the result of an acute injury, that being the disc herniation referenced in the MRI report. (Depo., Dr. Friedman p.14). Again, Dr. Verska would concur. (Depo., Dr. Verska p.28).

Dr. Friedman compared the results of Claimant's 2006 MRI scans with the results of the MRI scans done five years later in 2011. He noted two changes of most

significance. First, the disc herniation present in the 2006 MRI scans had resolved. He did not find this surprising. He explained:

> Disks heal. So the normal, natural history of having a disk herniation, especially with a piece migrating upward or cephalad, would be consistent with a disc bulge and potentially some material coming out.
>
> The body will attempt to heal that and the way it will attempt to heal that is with scarring, as scars retract over time, they shrink – that's a normal response to trying to heal something – and it is reasonable and most likely medically appropriate that the disk herniation resolved itself as a result of the normal natural healing process. (Depo., Dr. Friedman p.15)

The second significant fact emerging from comparison of the two MRI results was that there were no acute findings in the 2011 scans. What was seen is instead a progression of the pre-existing degenerative conditions. What Dr. Friedman observed was evidence of the normal, natural worsening or progression of Claimant's degenerative arthritic process. "The findings of 2006 simply are identical to the findings in the 2011 MRI, with the exception that they have progressed as I would have expected them to over five years." (*id* at p.17). Dr. Friedman saw no evidence that the industrial accidents had accelerated the progression of Claimant's degenerative disease process. (*id* at p.37). Thus, he concluded that neither of Claimant's two neck strains brought about the need for surgery and that the surgery was done to address conditions relating to Claimant's ongoing disease process, unrelated to the industrial accidents. (*id* at p.19; see also Dr. Friedman's reports, Def's Ex. 1). Dr. Friedman's opinions, in and of themselves, provide ample evidence to support the Commission's decision.

Of course, there were other medical opinions in the record on the issue of causation in relation to Claimant's surgery. The Industrial Commission considered all of

those opinions and considered the underlying facts on which each opinion was based. (See Findings of Fact, Conclusions of Law and Order, R. pp.38-49). At the end of the day, the Commission determined that Dr. Friedman's opinions were the most persuasive, finding:

> The most credible opinion is that of Dr. Friedman, who offered a cogent opinion that while the 2006 accident might have caused a C4-5 disk bulge, that lesion had healed by the time of the 2011 MRI and cannot fairly be said to be implicated in the need for Claimant's cervical spine surgery. By the same token, the conditions for which surgery was actually required, i.e. Claimant's well-documented multilevel degenerative changes, were years in the making, as evidenced by the 2006 and 2011 MRI studies, and cannot fairly be said to be the product of the 2010 accident. (R. 49).

As demonstrated above, the Commission had ample factual support for its finding that the Defendants were not responsible for Claimant's surgery. Recognition of that should end the inquiry on this appeal, as this Court's review is limited. On appeal Claimant cannot demonstrate that the Commission lacked the substantial competent evidence for its decision. Consequently, the Commission decision should be affirmed.

Claimant's Brief argues at length that the Commission should have favored other causation opinions and should have viewed Claimant's testimony as having more credibility. These arguments amount to nothing more than a request that this Court engage in the process of re-weighing the evidence. Decades of precedent and a constitutional provision preclude the Court from engaging in that process. The Commission's decision has ample factual support and that resolves this appeal.

Nonetheless, a few brief comments on Claimant's arguments may be appropriate. First, as regards Claimant's argument that the Commission should have accepted other

medical opinions and found that the need for surgery was related to the 2010 accident, it must be noted that all of the medical causation opinions in the record were reviewed and discussed by the Industrial Commission in its decision. The opinion of Claimant's IME physician, Dr. Verska, was considered and discussed by the Industrial Commission, as were the two conflicting opinions of Dr. Doerr. The Commission determined that Dr. Verska's opinion and the opinions of Dr. Doerr were substantially affected by the facts that they were either provided or asked to assume. For example, Dr. Verska opined that Claimant's 2010 industrial accident caused the need for his surgery. Dr. Verska's opinion was based on the history he was provided, which was that although Claimant suffered an injury in 2006 he recovered fully and then after the 2010 accident Claimant had unremitting neck and upper extremity symptoms. This is essentially the position that Claimant adopted in his testimony at the hearing. (See Tr. pp.65,92). The Commission struggled to reconcile this with other evidence in the record, specifically the contemporaneous medical records. Of particular note was the fact that Claimant had not mentioned the occurrence of the 2010 accident to his primary care physician, Dr. Foutz. This clearly concerned the Commission.

> Claimant has testified that the January 12, 2010 accident was a signal event, and that he has gone downhill ever since, and yet, he failed to mention this event when discussing the etiology of his problems with Dr. Foutz. (R. p.44).

The Commission also gave appropriate consideration to the conflicting opinions of Dr. Doerr, who had at first opined that the 2006 accident brought about the need for surgery and later executed what the Commission referred to as an "about face" in concluding that the 2010 accident caused the need for surgery. (See discussion, R. pp.44-

46). Again, the Commission was troubled by the inconsistency between Claimant's testimony implicating the 2010 accident and the contemporaneous records. Claimant was first seen by Dr. Doerr on August 18, 2011, more than a year and a half after the 2010 accident. Yet, he gave Dr. Doerr a history implicating the 2006 accident as the cause of his cervical spine symptoms and made no mention of the 2010 accident. (Ex. E, pp.47, 61,64). This caused the Commission to question not only the basis for Dr. Doerr's causation opinion but also the credibility of Claimant's hearing testimony. The Commission observed:

> Why, if Claimant's testimony at hearing is to be believed, would Claimant fail to immediately advise Dr. Doerr of the accident to which he now attributes his unrelenting and progressively worsening neck and upper extremity pain? (R. p.46)

The Commission ultimately concluded that Claimant's hearing testimony implicating the 2010 accident was not substantively credible when viewed in the context of the contemporaneous records. (R. p.48). Claimant spends a good portion of the briefing on appeal suggesting that the Commission should have found his testimony to be more credible. Again, the question of witness credibility is a question of fact for the Commission. If the Commission's credibility findings are supported by substantial competent evidence they will not be disturbed on appeal. *Harris v. Indep. Sch. Dist. No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). The problems with Claimant's substantive credibility are discussed throughout the Commission's opinion.

The reality is that Claimant tried to sell a story that really wasn't particularly credible. Medical evidence generally indicated that Claimant suffered two neck strains from which he recovered after a modest amount of treatment. In both instances, Claimant

was able to return to work full time, full duty for months without seeking medical treatment. When the it later became clear that Claimant's neck was going to be a significant problem for him, Claimant attempted to relate his neck symptoms to his military service, to his 2006 accident and ultimately to his 2010 accident. Claimant was unable to convince the Commission to rule in his favor, not because the Commission erred, but because Claimant's story wasn't consistent with the medical evidence. The Commission concluded, after sorting through all of the evidence that Claimant had failed to meet his burden of proving a causal connection between either of the industrial accidents and the need for his surgery. These are factual findings that are supported by substantial competent evidence. This court is required to decline Claimant's invitation to reweigh all of this evidence and should affirm.

C. Miscellaneous Issues:

1. Claimant's reliance on *Vawter v. U.P.S.* and *Page v. McCain Foods* is entirely misplaced.

Claimant's Brief, on two occasions, cites this Court's decision in *Vawter v. U.P.S.*, 155 Idaho 903, 318 P.2d 893 (2014). (Appellant's Opening Brief pp. 13, 28). Also mentioned on page 28 of the Brief is the decision in *Page v. McCain Foods*, 141 Idaho 342, 109 P.3d 1084 (2005). Claimant argues that these decisions require "doubts" about an injury to be resolved in favor of Claimant and that there is a "legal presumption" "reversing the burden of proof to Defendants/Respondents." (Appellant's Opening Brief pp.13,28).

Claimant's reading of the cases is way off the mark. To the extent that *Vawter* and *Page* may discuss a presumption, the presumption applies to determining whether an

accident and injury occurring on the employer's premises is compensable under the Worker's Compensation law. Where an employee's accident occurs on the employer's premises, during work hours, the employer may have to overcome a presumption that the claim is compensable. However, the compensability issue was never in doubt here. Both of Claimant's claims were accepted and benefits were paid. This Court has never held that Defendants have the burden of proving the negative on an issue of medical causation – that an accident did not cause the need for requested treatment. In fact, the case law is directly contrary to that proposition. A claimant, who has previously received benefits and is seeking benefits for additional medical care allegedly caused by an industrial accident, still has the burden of proving that the need for the additional medical care was caused by the accident. *Gomez*, supra and *Walters*, supra.

Nor is there any rule requiring "doubt" about contested facts be resolved in favor of Claimant. Again the precedent is to the contrary. While Claimant may be entitled to a liberal construction of the workers compensation law, the Commission is not required to construe facts liberally in favor of the worker where the evidence is conflicting. *Aldrich v Lamb-Weston, Inc.*, 122 Idaho 361,363. 834 P.2d 878, 890 (1992); *Livingston v. Ireland Bank*, 128 Idaho 66, 910 P.2d 738 (1995).

Claimant had the burden of proving his case and any suggestion to the contrary is simply wrong.

2. **The Referee's proposed decision is really of no consequence.**

The Defendants asked this court to augment the record on appeal to include the Referee's proposed decision, which was ultimately not adopted by the Industrial

Commission. Defendants point in doing so was to dispel any possible inference that the Referee's proposed decision was favorable to Claimant. It was not.

Reading through the Referee's proposed decision, the Court will notice a difference in the Referee's treatment of issues relating to the claim arising from Claimant's 2006 accident. That is the primary difference between the Referee's proposed decision and the Industrial Commission's ultimate decision. The Referee would have found in favor of the Defendants on the 2006 claim on the basis that Claimant had effectively abandoned the claim. The Commission, on the other hand, went ahead and discussed 2006 claim substantively and found a lack of proof supporting Claimant's contentions. Otherwise, the Referee's proposed decision is really of no consequence.

3. Regarding Claimant's "all remaining issues are moot" argument.

Toward the end of Appellant's Opening Brief Claimant argues that the Commission erred in determining that "all remaining issues were moot." As the Defendants understand this argument, Claimant is simply suggesting that if the Court should reverse the Commission's decision then Claimant should be free to pursue other benefits besides the medical treatment. Defendants really have no quarrel with that proposition and believe that this would be the natural course of the case if there was a reversal. Of course, Defendants do not concede that the Commission decision should be reversed.

III.

Conclusion

The Industrial Commission sifted through all of testimony and documentary evidence submitted on both sides of the case. The Industrial Commission and its Referee

allowed Claimant to present all of the testimony and written evidence he desired to present. The presentation of evidence by Claimant was not hampered by any evidentiary rulings of the Referee or the Industrial Commission. No error is asserted with regard to the conduct of the Industrial Commission hearing process. Claimant had his "day in court" and he was treated fairly.

The alleged errors that form the basis of this appeal boil down to nothing more than Claimant's dissatisfaction with the result and a belief that the Commission should have viewed his evidence more favorably and should have ruled in his favor. In reality, Claimant's appeal simply asks this Court to review the evidence and make its own decision as to whether Claimant should prevail. This is not the role of the Court. In seeking to establish on appeal that the Commission erred in its factual findings, Claimant has taken on a heavy burden. This is a burden that he has not and cannot meet because there is clearly substantial competent evidence in the record supporting the Commission's factual findings on the issue of medical causation.

This court should affirm the decision of the Industrial Commission and should award costs on appeal to the Defendants.

DATED this 10th day of November 2015.

BOWEN & BAILEY, LLP

W. SCOTT WIGLE - of the Firm
Attorneys for Respondents/Employer/Surety

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of November, 2015, two true and correct copies of the foregoing document were delivered to the following party(ies) in the method indicated:

Justin Aylsworth	[X] U.S. MAIL
Goicoechea Law Offices, Chtd.	[ ] HAND DELIVERY
PO Box 6190	[ ] FACSIMILE
Boise, ID 83707-6190	

W. Scott Wigle